Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

SKYWALKER COMMUNICATIONS OF INDIANA, INC.,

Petitioner,

v.

SKYWALKER COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Indiana's statute of frauds justifies the dismissal of a large diversity lawsuit in its entirety under Fed. R. Civ. P. 12(b)(6) when the complaint articulates seven (7) separate and distinct claims under state statutory, tort, and common laws?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Skywalker Communications of Indiana, Inc. states that it has no corporate parent and that no publicly held company owns 10% or more of its stock.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinions (per Lee, D.J.) originally denying and later granting the dismissal of the litigation under Rule 12(b)(6) are unpublished. (Appendix ("Pet. App.") 15a-54a). The Seventh Circuit's opinion (per Rovner, C.J., joined by Coffey and Manion, JJ.) is published at 333 F.3d 829. (Pet. App. 1a-6a). The Seventh Circuit's order denying a stay of the mandate is not otherwise published.

STATEMENT OF JURISDICTION

The Seventh Circuit entered its opinion and order on June 25, 2003. Justice Stevens subsequently extended the time to file this petition for a writ of certiorari to and including November 22, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable provision of Indiana's statute of frauds provides that:

> Sec. 1. No action shall be brought in any of the following cases:
>
> > Fifth. Upon any agreement that is not to be performed within one (1) year from the making thereof; . . .

> Unless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, excepting however, leases not exceeding the term of three (3) years.

Ind. Code Section 32-2-1-1, reenacted at Section 32-21-1-1. (Pet. App. 55a). Indiana's Crime Victims Relief Act permits causes of action for criminal conversion and criminal mischief to be pled in a civil case to recover for pecuniary losses suffered by victims. Ind. Code Section 34-24-3-1. (Pet. App. 56a-57a). A cause of action for "criminal mischief" arises by statute against a person who knowingly or intentionally causes another to suffer pecuniary loss by deception or by an expression of intention to injure another person or to damage the property or to impair the rights of another person. Ind. Code Section 35-43-1-2(a)(2). (Pet. App. 58a). On the other hand, a cause of action for "criminal conversion" arises by statute against a person who knowingly or intentionally exerts unauthorized control over the property of another person. Ind. Code Section 35-43-4-3. (Pet. App. 58a).

STATEMENT OF THE CASE

On September 14, 1999, Skywalker Communications of Indiana, Inc. (hereinafter referred to as "Skywalker-Indiana") filed a complaint based upon diversity of citizenship against Skywalker Communications, Inc. (hereinafter referred to as "Skywalker-Missouri") in the district court for the Northern District of Indiana. The complaint was sixteen (16) pages long and had nineteen (19) documentary exhibits attached

to it. It generally alleged that, as of early 1996, the Skywalker corporations entered into a joint venture to promote, market, and sell digital satellite television furnished by one Echostar Satellite Corporation to consumers within a seven (7) state territory: Illinois, Indiana, Kansas, Kentucky, Michigan, Missouri, and Ohio. Skywalker-Indiana was to market the digital satellite television through its dealers located in Indiana, Michigan, and Ohio and Skywalker-Missouri was to market it through its dealers located in Illinois, Kansas, Kentucky, and Missouri. Both corporations shared profits and commissions from the sale of the digital satellite television. In promoting the venture, Skywalker-Indiana alleged that it built an extensive network of dealers who marketed and sold the digital satellite television throughout Indiana, Michigan, and Ohio.

The complaint additionally alleged that the business relationship between the Skywalker corporations began to deteriorate in early 1999. Skywalker-Missouri, through its president, contacted Skywalker-Indiana's dealers by letter and informed them that the Indiana corporation was no longer going to be involved in the business. Further, although Skywalker-Indiana had previously ordered products and services directly from Echostar Satellite Corporation, Echostar decided that it would no longer supply it with hardware, equipment, and programming for the digital satellite television. Skywalker-Missouri informed Skywalker-Indiana's dealers that they should do business directly with it, not with Skywalker-Indiana. At the same time, Skywalker-Missouri informed Skywalker-Indiana by letter that it was terminating a contractual agreement consummated in 1992 between the two corporations and that Skywalker-Indiana must immediately cease using the *Skywalker* name, which was licensed to it by this 1992 agreement.

Finally, the complaint generally alleged that Skywalker-Indiana suffered damages and irreparable harm from Skywalker-Missouri's actions and that appropriate legal and equitable relief were merited. It asserted that monetary damages from, and equitable relief against, Skywalker-Missouri were warranted based upon: (a) breach of fiduciary duty; (b) tortious interference with contract relations; (c) breach of contract; (d) violation of Indiana's criminal mischief statute; (e) violation of Indiana's criminal conversion statute; (f) constructive fraud; and (g) promissory estoppel. In response to this complaint, Skywalker-Missouri filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and an accompanying memorandum which argued in part that the joint venture, which allegedly was not in writing, was unenforceable under Indiana's statute of frauds because it could not be performed within one (1) year. The district court initially denied this motion. Pet. App. 30a-54a. Skywalker-Indiana later filed an amended complaint, which was answered by Skywalker-Missouri, and the case was litigated on the merits for a period of approximately two (2) years, at which point Skywalker-Missouri asked the district court to reconsider its denial of the motion to dismiss. This request once again raised the issue of whether the joint venture was unenforceable because it violated the one year clause of Indiana's statute of frauds.

On November 13, 2001, the district court granted the request for reconsideration and dismissed the complaint and amended complaint in their entireties under Rule 12(b)(6). Pet. App. 15a-29a. The court reasoned that the joint venture was intended to be performed over a period of five (5) years because that was the term of Skywalker-Missouri's contractual agreement with Echostar Satellite Corporation. Pet. App. 23a-29a. As such, the joint venture could not be

performed within one (1) year and, since it was not in writing, it was therefore unenforceable under the one year clause of the statute of frauds. *Id.* 28a. Upon motion, Skywalker-Missouri's counterclaim in the litigation was then dismissed "without prejudice." A judgment was entered dismissing the complaint, amended complaint, and the counterclaim, and Skywalker-Indiana filed a timely notice of appeal directed to this judgment. Later, Skywalker-Indiana filed a motion to issue certificate under Rule 54(b) because the dismissal of Skywalker-Missouri's counterclaim without prejudice rendered the apparent final judgment not immediately appealable. The district court granted the certificate under Rule 54(b) and expressly determined that no just reason existed for delay. Pet. App. 7a-14a. Appropriate amended judgments were entered. *Id.*

On appeal, the Seventh Circuit affirmed the district court's dismissal of all of the seven (7) claims for relief in the lawsuit. Pet. App. 1a-6a. Its opinion, which does not mention or apply the legal standard for effectuating dismissals under Rule 12(b)(6), states in part:

> [Skywalker-Indiana] . . . contends that its claims for fraud, conversion, criminal mischief, promissory estoppel, and tortious interference with contractual relations are unaffected by the statute of frauds, which [it] says is a defense only to contract claims. But the statute works more like a rule of evidence, . . . ,barring any action, however labeled, that turns on proof of an oral promise, . . . (citations omitted/bracketed material added).

Pet. App. 5a. The court therefore affirmed the dismissal of all of Skywalker-Indiana's outstanding claims. The opinion

specifically states, citing *Consolidation Servs. Inc. v. Keybank Nat'l Ass'n*, 185 F.3d 817 (CA7 1999), that the claim of promissory estoppel was properly dismissed because no "compelling evidence" of the existence or terms of a contract between the Skywalker corporations was present. *Id.* 5a-6a. The court, upon motion, refused to stay the issuance of the mandate in the case. This petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two compelling reasons. First of all, the Seventh Circuit ignores and refuses to apply the controlling legal standard established by this Court for effectuating dismissals under Fed. R. Civ. P. 12(b)(6). *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A significant deviation from this Court's precedent is therefore presented for review by this petition. Second, the reasoning of the Seventh Circuit's opinion in this diversity case amounts to "blatant federal-court nullification of state law" and is plainly wrong under Indiana substantive jurisprudence, all of which this Court recognizes to be a ground for granting a petition for a writ of certiorari. *Leavitt v. Jane*, 518 U.S. 137, 144-45 (1996).

I. The Seventh Circuit Ignores And Refuses To Apply The Legal Standard Established By This Court For Dismissing The Litigation Under Rule 12(b)(6).

The Seventh Circuit's opinion dismissing all of the seven (7) claims for relief in the litigation fails to mention, let alone apply, the legal standard established by this Court for effectuating dismissals under Rule 12(b)(6). Pet. App. 1a-6a. Specifically, a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, *supra*, 355 U.S. at 45-46. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). A complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This rule sanctions a simplified pleading system which applies to all civil actions, with limited exceptions. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002). Skywalker-Indiana very plainly cited these principles to the Seventh Circuit in its appellate brief.

Factually, the district court denied Skywalker-Missouri's motion to dismiss under Rule 12(b)(6) at the beginning of the lawsuit, and the case was then litigated on the merits for a period of approximately two (2) years, at which point Skywalker-Missouri asked the court to reconsider its denial of the motion, which the court thereafter granted in its entirety. The Seventh Circuit fails, however, to mention or apply this Court's legal standard for granting such a motion, and its analysis of the issues is disconnected from this Court's approval of dismissals for failure to state a claim only under what amount to compelling circumstances. This disconnection renders the Seventh Circuit's statement of the facts and analysis of the legal questions in its opinion logically flawed and procedurally erroneous. The standard for dismissing a complaint for failure to state a claim upon which relief may be granted should apply at any stage of the proceedings where such a motion is presented, *see* Fed. R. Civ. P. 12(h)(2) (motion to dismiss permissible at trial on the merits), and the application of that standard would have had a dispositive effect on the outcome of this appeal. An important issue of federal procedural law is therefore presented by the Seventh Circuit's unstructured analysis and undisciplined treatment of the issues.

II. The Seventh Circuit Blatantly Nullifies State Law On Five (5) Of Skywalker-Indiana's Claims And Is Plainly Wrong Under Indiana Substantive Law.

This Court has seen fit to grant a petition for a writ of certiorari in order to review a federal appellate court's application of state law "where the alternative is allowing blatant federal-court nullification [of such law]" and where the court's decision on such a matter is "plainly wrong." *Leavitt*, *supra*, 518 U.S. at 144-45. In this case, the Seventh Circuit, under its own articulated rationale, erroneously and improperly found that five (5) of Skywalker-Indiana's claims for relief were correctly dismissed by the district court: (a) tortious interference with contract relations; (b) promissory estoppel; (c) constructive fraud; (d) violation of Indiana's criminal mischief statute; and (e) violation of Indiana's criminal conversion statute. (Skywalker-Indiana concedes that its two (2) claims for breach of contract and breach of fiduciary duty were properly dismissed). In doing so, the Seventh Circuit has blatantly nullified state law in Indiana which governs such claims.

A. Tortious Interference With Contract.

The Seventh Circuit holds that the district court correctly dismissed Skywalker-Indiana's claim for tortious interference with contract because the statute of frauds "works . . . like a rule of evidence, . . . , barring any action, however labeled, that turns on proof of an oral promise, ..." Pet. App. 5a. In Indiana, however, an action for tortious interference with contract has the following elements: (1) the existence of a valid and enforceable contract; (2) the defendant's knowledge of the existence of the contract; (3) defendant's intentional inducement of a breach of the contract; (4) the absence of

justification; and (5) damages resulting from defendant's wrongful inducement of the breach. *National City Bank, Indiana v. Shortridge*, 689 N.E.2d 1248, 1252 (Ind. 1997); *Levee v. Beeching*, 729 N.E.2d 215, 221 (Ind. App. 2000). The "valid and enforceable contracts", i.e., element number one of the tort, that Skywalker-Indiana alleged in its complaint were tortiously interfered with by Skywalker-Missouri were the ones that it had with its dealers located in Indiana, Michigan, and Ohio. This claim for relief, under the Seventh Circuit's own rationale for upholding the dismissal, simply does not turn on proof of an oral promise between the Skywalker corporations, since Skywalker-Missouri is alleged by the complaint to be the tortfeasor, not a party to an oral contract subject to the statute of frauds. Whether an oral contract or joint venture of some kind existed between the Skywalker corporations, and was therefore subject to the statute of frauds, is patently irrelevant to establishing the necessary elements of this tort. For this reason, Indiana's statute of frauds cannot logically have provided a defense to Skywalker-Indiana's claim for relief based upon tortious interference with contract. To hold otherwise blatantly nullifies this claim under Indiana substantive law.

B. Promissory Estoppel.

The Seventh Circuit holds, citing *Consolidation Servs. Inc. v. Keybank Nat'l Ass'n*, 185 F.3d 817 (CA7 1999) (allegation of promissory estoppel resolved on summary judgment), that Skywalker-Indiana's claim of promissory estoppel was properly dismissed because no "compelling evidence" of the existence or terms of a contract between the Skywalker corporations was present. Pet. App. 5a-6a. In Indiana, an action based upon promissory estoppel has

the following elements: (1) a promise by the promisor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise. *First National Bank of Logansport v. Logan Manufacturing Company, Inc.*, 577 N.E.2d 949, 954 (Ind. 1991). The Supreme Court of Indiana has expressly recognized that, even when oral promises fall within the statute of frauds, they may be enforced under the doctrine of promissory estoppel. *Brown v. Branch*, 758 N.E.2d 48, 51 (Ind. 2001). *See Tincher v. Greencastle Federal Savings Bank*, 580 N.E.2d 268, 272 (Ind. App. 1991). Even if, therefore, the joint venture alleged to exist by Skywalker-Indiana in its complaint were barred by the statute of frauds because it is not in writing, Skywalker-Missouri's oral promises made to Skywalker-Indiana remain enforceable under the doctrine of promissory estoppel. While the Seventh Circuit holds that no "compelling evidence" of the existence or terms of an oral contract between the Skywalker corporations was present, questions of fact and evidence to support a claim of promissory estoppel are inappropriately and erroneously resolved on a motion to dismiss under Rule 12(b)(6) as opposed to a motion for summary judgment or a trial. *See Marks v. CDW Computer Centers, Inc.*, 122 F.3d 363, 367 (CA7 1997). To hold otherwise blatantly nullifies a recognized estoppel claim under Indiana substantive law.

C. Constructive Fraud.

The Seventh Circuit likewise holds that Skywalker-Indiana's claim for constructive fraud was properly dismissed because it turns on proof of an oral promise that is barred by the statute of frauds. Pet. App. 5a. In Indiana, an action for

constructive fraud has the following elements: (1) a duty owing by the party accused of the misconduct to the complaining party due to their relationship; (2) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or by remaining silent when a duty to speak exists; (3) reliance thereon by the complaining party; (4) injury to the complaining party as a proximate result thereof; and (5) the gaining of an advantage by the party accused of the misconduct at the expense of the complaining party. *In re Matter of Scahill*, 767 N.E.2d 976, 979 (Ind. 2002); *Rice v. Strunk*, 670 N.E.2d 1280, 1284 (Ind. 1996). The Supreme Court of Indiana has also expressly recognized that, in addition to various forms of estoppel, constructive fraud is an equitable doctrine that may provide a basis for avoiding the statute of frauds. *Brown*, *supra*, 758 N.E.2d at 52 n.2. In Indiana, in fact, equity will not permit the statute of frauds to be used to perpetrate a fraud. *Ohio Valley Plastics, Inc. v. National City Bank*, 687 N.E.2d 260, 263 (Ind. App. 1997). The Seventh Circuit, therefore, blatantly nullifies this claim under Indiana substantive law by sanctioning the district court's dismissal of it under Rule 12(b)(6).

D. Criminal Conversion and Criminal Mischief.

The Seventh Circuit also holds that Skywalker-Indiana's statutory claims for criminal conversion and criminal mischief were properly dismissed because they turn on proof of an oral promise that is barred by the statute of frauds. Pet. App. 5a. As cited above, Indiana's Crime Victims Relief Act permits these causes of action to be pled in a civil case to recover for pecuniary losses suffered by victims. Ind. Code Section 34-24-3-1. Pet. App. 56a-57a. A cause of action for "criminal mischief" arises by statute against a person who

knowingly or intentionally causes another to suffer pecuniary loss by deception or by an expression of intention to injure another person or to damage the property or to impair the rights of another person. Ind. Code Section 35-43-1-2(a)(2). Pet. App. 58a. On the other hand, a cause of action for "criminal conversion" arises by statute against a person who knowingly or intentionally exerts unauthorized control over the property of another person. Ind. Code Section 35-43-4-3. Pet. App. 58a.

Skywalker-Indiana's claims for criminal conversion and criminal mischief and Skywalker-Missouri's defense of the statute of frauds are all based upon Indiana statutes, although the Seventh Circuit does not allude to this fact in its opinion. Rather, it makes the statutory claims for criminal conversion and criminal mischief give way to the defense of the statute of frauds, thereby canceling out the two statutory claims. The Supreme Court of Indiana has unequivocally stated, however, that this approach to resolving statutory conflict is unjustifiable:

> When two statutes or two sets of statutes are apparently inconsistent in some respects, and yet can be rationalized to give effect to both, then it is our duty to do so. It is only when there is irreconcilable conflict that we can interpret the legislative intent to be that one statute gives way to the other. (citations omitted).

Wright v. Gettinger, 428 N.E.2d 1212, 1219 (Ind. 1981). Likewise, the Supreme Court of Indiana has also stated that:

> When reviewing a statute, courts give effect and meaning to every word. This Court's primary

> goal when construing the meaning of a statute is to determine the Legislature's intent. Given such deference to legislative intentions, an unambiguous statute is interpreted to mean what it plainly states, and its plain and obvious meaning may not be enlarged or restricted. (citations omitted).

AlliedSignal, Inc. v. Ott, 785 N.E.2d 1068, 1071-72 (Ind. 2003). The law is well settled that Indiana courts should construe a statute, if possible, in a manner harmonious to and consistent with other laws, rather than in a manner conflicting therewith. *Board of Medical Registration and Examination v. Turner*, 241 Ind. 73, 168 N.E.2d 193, 197 (1960). The Seventh Circuit's opinion dismissing the statutory claims is palpably at odds with these declarations of Indiana law. Its own rationale for sanctioning the district court's dismissal of the claims under Rule 12(b)(6), moreover, does not in fact justify that dismissal.

Most important, the statutory claims for criminal conversion and criminal mischief and the statute of frauds can be reconciled and harmonized by not materially expanding the statute of frauds as a defense, an expansion which the Seventh Circuit's opinion in fact endorses. No known Indiana decision interpreting the statute of frauds suggests that the statute bars non-contractual claims based upon other legislative enactments. *Cf. Ohio Valley Plastics, Inc., supra*, 687 N.E.2d at 263-64 (application of statute not controlled by technical pleading labels). Restricting the reach of the statute to contract and closely related claims gives the statute a plain and reasonable breadth that is justified under the foregoing principles of statutory analysis and the statute's own express language. Second, however, even under the

Seventh Circuit's own rationale, Skywalker-Indiana's statutory claims do not turn on proof of an oral promise that is barred by the statute of frauds. Indeed, the very same facts, i.e., Skywalker-Missouri's interference with Skywalker-Indiana's dealers located in Indiana, Michigan, and Ohio, that are alleged by the complaint to support the claim of tortious interference with contract can in fact support the statutory claims. The explicit language of these statutes simply does not make the alleged joint venture or any oral promise between the Skywalker corporations even necessary or relevant to consider. To hold otherwise blatantly nullifies these claims under Indiana substantive law and is plainly wrong.

CONCLUSION

For the foregoing reasons, Skywalker-Indiana respectfully requests that its petition for a writ of certiorari be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 25, 2003

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-1180

SKYWALKER COMMUNICATIONS OF INDIANA, INC.,

Plaintiff-Appellant,

v.

SKYWALKER COMMUNICATIONS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 1:99-CV-385—**William C. Lee**, *Judge.*

ARGUED FEBRUARY 13, 2003—DECIDED JUNE 25, 2003

Before COFFEY, MANION, and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* In this appeal, an Indiana corporation originally known as Apollo Satellite Systems, Inc. challenges the dismissal of its contract-based diversity suit as barred by Indiana's statute of frauds. We affirm.

Appendix A

According to the complaint and attached documents, Apollo entered a written contract with a Missouri corporation called Skywalker Communications, Inc. to sell satellite equipment under the "Skywalker" name through a network of dealers. The written contract, which was dated 1992 and was attached to the complaint, provided for automatic yearly renewal but required Apollo to cease using the Skywalker name upon the contract's termination. Four years later, the complaint alleged, Apollo (which was then operating as "Skywalker Communications of Indiana, Inc.") entered a second agreement with Skywalker that was "separate and independent" from the first. The 1996 agreement, which Apollo conceded was unwritten, concerned the sale of EchoStar brand satellite equipment in a seven-state territory for which the parties hoped to obtain distribution rights. According to the complaint, the parties agreed to split the sales territory but to hold themselves out to EchoStar as a single entity for purposes of securing the contract. A contract attached to the complaint shows that EchoStar granted distribution rights for the territory to Skywalker (but not Apollo) for a five-year period. Also attached were two letters from Skywalker dated 1999: one notifying Apollo that Skywalker would not be renewing the 1992 contract for the following year and that Apollo must cease using the Skywalker name; another to Apollo's dealers informing them that Apollo was no longer an authorized distributor of EchoStar products and inviting the dealers to place future EchoStar orders through Skywalker instead.

The complaint sought recovery under a variety of theories: constructive fraud based on Skywalker's misrepresentations relating to the oral agreement; criminal

mischief, conversion, and breach of contract and fiduciary duty based on Skywalker's failure to pay amounts owed to Apollo under the oral agreement; and tortious interference with Apollo's dealer contracts relating to EchoStar equipment sales. Skywalker sought dismissal based on Indiana's statute of frauds, which bars actions involving an agreement not to be performed within one year from its making unless the agreement or a memorandum describing it is in writing and signed by the party to be charged, *see* Ind.Code § 32-21-1-1, and the district court, observing that the object of the oral agreement was the fulfillment of a five-year EchoStar distribution contract, granted the motion. *See Blackstone Realty LLC v. FDIC*, 244 F.3d 193, 197 (1st Cir. 2001) (complaint may be dismissed based on statute of frauds); *Zayre Corp. v. S.M. & R. Co., Inc.*, 882 F.2d 1145, 1153 (7th Cir. 1989) (same).

Apollo does not dispute the district court's conclusion that the oral agreement could not be performed within one year, but it contends that the agreement is sufficiently described by certain documents attached to its complaint. That argument is waived, however, because Apollo failed to raise it in the district court, where it argued instead that the agreement *was* capable of being performed within one year and that partial performance removed the agreement from the statute of frauds. *See, e.g., Zayre*, 882 F.2d at 1154-56 (refusing to consider new arguments about why oral contract survived Illinois statute of frauds). Even were we to consider the argument we would not find it persuasive. Multiple memoranda may satisfy the writing requirement if each indicates that it is related to the same transaction and is

signed by the party to be charged, *see, e.g.*, *Newman v. Huff*, 632 N.E.2d 799, 803 (Ind. Ct. App. 1994), and if the memoranda, taken together, contain all of the agreement's "essential stipulations and undertakings," *see Whiteco Indus., Inc. v. Kopani*, 514 N.E.2d 840, 847 (Ind. Ct. App. 1987); *Block v. Sherman*, 34 N.E.2d 951, 955 (Ind. Ct. App. 1941). *See also Consolidation Servs. Inc. v. KeyBank Nat'l Ass'n*, 185 F.3d 817, 819 (7th Cir. 1999) (under Indiana law, writing must be evidence of the contract itself and its essential terms). Here, Apollo points to several documents: the 1992 contract; distributor agreements Skywalker entered with EchoStar and another satellite company; a letter reflecting a territory-sharing agreement the parties reached in 1998; and Apollo's own business records from 1999. But none of these documents mention an agreement formed between Skywalker and Apollo in *1996*, let alone specify what amounts Skywalker might have been obligated to pay Apollo under such an agreement. *Cf. Zayre*, 882 F.2d at 1152-54 (letters between company presidents unlikely to satisfy writing requirement because they did not mention agreement to buy jewelry or agreement to pay mark-up price for it). Apollo's only explanation as to how these documents imply the existence of a 1996 agreement is its assertion that "[g]iven [ ] that the 1992 Agreement existed between the [ ] corporations, only a short leap is required to reach the conclusion that [the 1996 agreement] did as well." We disagree.

On the contrary, the 1992 contract and other documents are no more supportive of Apollo's contention that the parties formed a second agreement in 1996 than with Skywalker's position that the parties did *not* enter a second agreement in

1996 but instead continued operating under the 1992 written contract until Skywalker properly terminated it in 1999. *Cf. Consolidation Servs.*, 185 F.3d at 820-21 (partial performance that is equally consistent with competing versions of contract will not remove contract from Indiana statute of frauds).

Apollo also contends that its claims for fraud, conversion, criminal mischief, promissory estoppel, and tortious interference with contractual relations are unaffected by the statute of frauds, which Apollo says is a defense only to contract claims. But the statute works more like a rule of evidence, *see, e.g.*, *Webcor Packaging Corp. v. Autozone, Inc.*, 158 F.3d 354, 356 (6th Cir. 1998); *Blanke v. Alexander*, 152 F.3d 1224, 1231 (10th Cir. 1998), barring any action, however labeled, that turns on proof of an oral promise, *see Ohio Valley Plastics, Inc. v. Nat'l City Bank*, 687 N.E.2d 260, 263-64 (Ind. Ct. App. 1997) (borrower's fraud suit based on loan officer's false assurances that loan had been approved was in substance an action upon an unwritten loan agreement and so was barred by statute of frauds); *Whiteco*, 514 N.E.2d at 844. It is true, as Apollo notes, that promissory estoppel may be used to avoid the statue of frauds, *see, e.g.*, *Brown v. Branch*, 758 N.E.2d 48, 52 (Ind. 2001); *Ohio Valley*, 687 N.E.2d at 264, but as we have explained before, the exception is limited to cases where reliance on an oral promise provides compelling evidence of the existence and terms of a contract, *see Consolidation Servs.*, 185 F.3d at 822. Apollo's only asserted acts of reliance are expenditures on advertising, inventory, and dealership development. Because these acts are fully consistent with Skywalker's position that the parties

were operating under the original contract, they are not compelling evidence of the existence or terms of a later oral agreement.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — SECOND AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA DATED AND FILED AUGUST 7, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case No. 1:99-CV-385

SKYWALKER COMMUNICATIONS OF INDIANA, INC.

PLAINTIFF/COUNTER-DEFENDANT

v.

SKYWALKER COMMUNICATIONS, INC.

DEFENDANT/COUNTER-PLAINTIFF

SECOND AMENDED
JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff Skywalker Communications of Indiana, Inc.'s Complaint and

Appendix B

Amended Complaint were dismissed on November 13, 2001 for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). Defendant/Counter-Plaintiffs Skywalker Communications, Inc.'s Counterclaim was dismissed without prejudice on December 17, 2001 pursuant to Fed.R.Civ.P. 41.

Stephen R. Ludwig, Clerk

By s/ [illegible]
Deputy Clerk

This document entered pursuant to Rules 79(a) and 58 of the Federal Rules of Civil Procedure on **August 7, 2002.**

APPENDIX C — AMENDED ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION DATED AND FILED AUGUST 5, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CIVIL NO. 1:99cv385

SKYWALKER COMMUNICATIONS OF INDIANA, INC.,

Plaintiff/Counter-Defendant,

v.

SKYWALKER COMMUNICATIONS, INC.,

Defendant/Counter-Plaintiff.

AMENDED ORDER

On July 26, 2002, this court entered an order granting the plaintiff's unopposed "Motion to Issue Certificate Under Rule 54(b)". Subsequent to the issuance of this order, plaintiff's counsel expressed concern that the order did not contain certain language, tracking Rule 54's language.

In the order of July 26, 2002, this court found the issuance of a Certificate under Rule 54(b) to be appropriate, but did not expressly find that "there is no just reason to delay the entry of the judgment." In the interest of assuring that plaintiff's counsel may property proceed with his appeal, the

court hereby amends the order of July 26, 2002 by adding the following sentence: "The court hereby makes the express determination that there is no just reason to delay the entry of judgment."

The Clerk of the Court is directed to issue an Amended Judgment.

Enter: August 5, 2002.

s/ William C. Lee
William C. Lee, Chief Judge
United States District Court

APPENDIX D — AMENDED JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA DATED JULY 26, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case No. 1:99-CV-385

SKYWALKER COMMUNICATIONS OF INDIANA, INC.

PLAINTIFF/COUNTER-DEFENDANT

v.

SKYWALKER COMMUNICATIONS, INC.

DEFENDANT/COUNTER-PLAINTIFF

AMENDED
JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's Complaint and Amended Complaint was dismissed pursuant

to Fed.R.Civ.P. 54(b) on November 13, 2001. Defendant/ Counter-Plaintiffs Counterclaim was dismissed without prejudice on December 17, 2001.

Stephen R. Ludwig, Clerk

By s/ [illegible]
Deputy Clerk

This document entered pursuant to Rules 79(a) and 58 of the Federal Rules of Civil Procedure on **July 26, 2002.**

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CIVIL NO. 1:99cv385

SKYWALKER COMMUNICATIONS OF INDIANA, INC.,

Plaintiff/Counter-Defendant,

v.

SKYWALKER COMMUNICATIONS, INC.,

Defendant/Counter-Plaintiff.

ORDER

This matter is before the court on a "Motion to Issue Certificate Under Rule 54(b)", filed by the plaintiff, Skywalker Communications of Indiana, Inc. on June 12, 2002. The defendant has indicated that it does not intend to file a response.

The plaintiff wishes to appeal from this court's November 13, 2001 dismissal of its Complaint and Amended Complaint. On December 20, 2001, the Clerk of the Court entered a Judgment dismissing the Complaint, the Amended Complaint, and the Counterclaim in this litigation. However, the Counterclaim was dismissed without prejudice which, according to the plaintiff, renders the Clerk's Judgment

non-final and non-appealable. *See ITOFCA, Inc. v. Megatrans Logistics, Inc.*, 235 F.3d 360, 363 (7th Cir. 2000).

Rule 54(b) permits this court to enter final judgment when it has resolved all of the claims concerning a single party to the litigation. *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 593 (7th Cir. 1990). In the present case, the defendant has not disputed the plaintiff's assertion that the dismissal of the plaintiff's Complaint and Amended Complaint has resolved all of the claims which the plaintiff presented in this litigation. Therefore, this court finds that the issuance of a Certificate under Rule 54(b) is appropriate.

Conclusion

On the basis of the foregoing, the plaintiff's "Motion to Issue Certificate Under Rule 54(b) is hereby GRANTED. The Clerk of the Court is hereby DIRECTED to enter a Judgment pursuant to Fed.R.Civ.P. 54(b) as to the November 13, 2001 dismissal of the plaintiff's Complaint and Amended Complaint.

Entered: July 26, 2002.

s/ William C. Lee
William C. Lee, Chief Judge
United States District Court

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION DATED NOVEMBER 13, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CIVIL NO. 1:99cv385

SKYWALKER COMMUNICATIONS OF INDIANA, INC.,

Plaintiff/Counter-Defendant,

v.

SKYWALKER COMMUNICATIONS, INC.,

Defendant/Counter-Plaintiff.

ORDER

This matter is before the court on a motion to reconsider and to conditionally strike jury demand filed by the defendant/counter-plaintiff Skywalker Communications, Inc. ("Skywalker/O'Fallon"), on September 27, 2001. The plaintiff/counter-defendant, Skywalker Communications of Indiana, Inc. (Skywalker/Fort Wayne), filed its response on October 15, 2001, to which Skywalker/O'Fallon filed its reply on October 23, 2001.

For the following reasons, the motion to reconsider will be granted and the motion to conditionally strike jury demand will be deemed moot.

Appendix E

Introduction

On September 28, 1999, Skywalker/O'Fallon filed a motion to dismiss Skywalker/Fort Wayne's complaint for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). In an Order dated October 12, 1999, this court denied Skywalker/O'Fallon's motion to dismiss. One of the issues discussed in the October 12, 1999 Order was whether Indiana's statute of frauds, *Ind. Code* §32-2-1-1, barred Skywalker/Fort Wayne's claims. At that time, this court held that the statute of frauds did not bar the claims. Skywalker/O'Fallon has since done more thorough research into the statute of frauds issue and has uncovered a case dating from 1859. *Wilson v. Ray*, 13 Ind. 1 (1859). Skywalker/O'Fallon believes that *Wilson* clearly holds that claims such as those pursued by Skywalker/Fort Wayne are barred by the statute of limitations, and requests that this court now reconsider its motion to dismiss.

The parties have agreed that this court has the authority to reconsider the motion to dismiss. *See Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. App. 1998). Additionally, the parties agree with the statement of facts and applicable standard of law as set forth in this court's October 12, 1999 Order, which the court restates below.

Appendix E

Relevant Facts

The relevant factual allegations, excerpted from plaintiff's complaint and, for purposes of this motion, accepted as true are as follows:

Skywalker/Fort Wayne, f/k/a Apollo Satellite Systems ("Apollo"), is an Indiana corporation. (Complaint, ¶2). Skywalker/O'Fallon is a Missouri corporation. (*Id.* at ¶3). The parties' business relationship commenced in November 1992, pursuant to an agreement between the former Apollo and Skywalker/O'Fallon whereby Skywalker/O'Fallon granted Apollo permission to conduct business under the Skywalker name. (*Id.* at ¶24). From that point onward, Apollo became known as Skywalker Communications of Indiana, Inc., or herein, Skywalker/Fort Wayne.

Separate and apart from this 1992 agreement, (*Id.*), in early 1996 Skywalker/Fort Wayne and Skywalker/O'Fallon (collectively herein "the Skywalker Entities") entered into an oral joint venture agreement ("the Agreement") for the purpose of selling and promoting the products and services of EchoStar Satellite Corporation ("EchoStar") With respect to DISH Network programming in the states of Missouri, Kansas, Illinois, Kentucky, Indiana, Michigan and Ohio ("the Territory"). (*Id.* at ¶¶1, 6). As part of the Agreement, the Skywalker Entities agreed to hold themselves out to EchoStar as one operating entity for the purpose of obtaining a contract for the sale of EchoStar products and services in the Territory. (*Id.* at ¶7). By holding themselves out to EchoStar as a single operating entity, the Skywalker Entities were able, through the merger of their respective dealer base

throughout the Territory, to meet the Subscriber Activation Quota ("SAQ") under the contract which requires distributors to meet quarterly and annual sales quotas. (*See* Plaintiff's Response, p. 7; Complaint, Exh. A, §2.1).

Thereafter, on February 22, 1996, Skywalker/O'Fallon, on behalf of both entities, entered into two agreements relating to EchoStar products. The first agreement, a Distributor Agreement with Houston Tracker Systems, Inc. ("HTS"), enabled the Skywalker Entities to market, distribute and sell satellite receivers and related components utilized in the reception of programming from satellite transponders owned by HTS of EchoStar DISH DBS receivers. The second agreement, a Distribution Commission Agreement with EchoStar, authorized the Skywalker Entities to be commissioned representatives of EchoStar (collectively, the "EchoStar Contracts").

Although the Skywalker Entities considered themselves a single entity to secure the underlying contracts for their business operations, they agreed to split the Territory which comprised the EchoStar Contracts into two smaller regional territories serviced independently by each entity. Under this arrangement. Skywalker/Fort Wayne was to distribute EchoStar products and services to its dealers in Indiana, Michigan, and Ohio while Skywalker/O'Fallon operated under the EchoStar Contract through its dealers in Missouri, Kansas, Illinois and Kentucky (*Id.* at ¶¶1, 8). With the EchoStar Contracts secured. Skywalker/Fort Wayne proceeded to build an extensive network of dealers throughout its portion of the Territory. (*Id.* at ¶14).

Appendix E

Within their respective regions, each entity was at liberty to contract with its own dealers to sell EchoStar products but retained mutual control over the subject of the joint business enterprise. (*Id.* at ¶10). As part of the Agreement, the Skywalker Entities agreed to share commissions and profits from the sale of EchoStar's services and products resulting from the EchoStar Contract. (*Id.*). The Skywalker Entities also agreed upon a payment arrangement for their operations. For instance, when a customer purchased EchoStar product from a Skywalker/Fort Wayne dealer, the customer forwarded payments directly to EchoStar for programming. In turn, EchoStar forwarded the monthly residual commissions due to Skywalker/Fort Wayne to Skywalker/O'Fallon. Skywalker/O'Fallon then deducted its share of the commission and remitted the remaining amount to Skywalker/Fort Wayne which, in turn, paid its dealers all residuals due them. Skywalker/Fort Wayne then retained the remaining as its income. (*Id.* at ¶10).

The Skywalker Entities operated in this fashion until August 1998, at which time a disagreement arose with respect to the regional Territory divisions. As a result, the Skywalker Entities clarified their agreement in a writing wherein Skywalker/Fort Wayne agreed to refrain from selling DISH networks sales and accessories and c-band electronics in Missouri, Illinois. Kansas, and Kentucky and Skywalker/ O'Fallon agreed to refrain from selling products in Indiana, Ohio and Michigan. (*Id.* at ¶13). Thereafter, the parties continued to conduct business, share commissions and profits and have mutual control over the subject matter of the joint enterprise as they had in the past. (*Id.* at ¶14).

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In March 1999, the Skywalker entitles experienced a strain in their business relationship when Skywalker/O'Fallon began engaging in unilateral decisionmaking concerning their enterprise without consulting Skywalker/Fort Wayne. (*Id.* at ¶5. Exh. E). On March 31, 1999 and again on April 22, 1999, Alex Shiriaev ("Shiriaev"). Skywalker/Fort Wayne's President, wrote Roger Criebaum ("Criebaum"), Skywalker/ O'Fallon's President and CEO, addressing these concerns. (*Id.* at Exh. E.; ¶16; Exh. F).

By August 1999, the parties' business relationship further deteriorated. By letter dated August 12, 1999, Skywalker/ O'Fallon informed Skywalker/Fort Wayne that it was terminating the November 17, 1992 agreement permitting Apollo to use the Skywalker Communications name and that as of November 17 ,1999 it must cease conducting business under the Skywalker name. (*Id.* at ¶24; Exh. K). Thereafter, Skywalker O'Fallon informed Skywalker/Fort Wayne's dealers in its regional Territory that it should engage in business directly with Skywalker/O'Fallon and that as of November 16, 1999, Skywalker/Fort Wayne was no longer an authorized distributor of EchoStar products. (Complaint at ¶23). Skywalker/O'Fallon also told Skywalker/Fort Wayne's dealers that it was assuming control over all commissions and profits from the sale of EchoStar products and services. (*Id.* at ¶17).

On September 6, 1999, Skywalker/O'Fallon requested dealer information from Skywalker/Fort Wayne, and indicated that if it did not receive this information it would notify EchoStar to stop sending its products to Skywalker/ Fort Wayne and/or to stop remitting payment to Skywalker/

Fort Wayne and its dealers. Two days later, on September 8, 1999, EchoStar notified Skywalker/Fort Wayne that it was discontinuing supplying products or services to it. (Id. at ¶¶20, 21).

On September 13, 1999, Skywalker O'Fallon informed Skywalker/Fort Wayne that it was immediately terminating Skywalker Communications Inc./Apollo Satellite, Inc.'s November 17, 1992 agreement that Skywalker/Fort Wayne should immediately cease using the Skywalker name, and should refrain from communications with EchoStar. On the same date. Skywalker/O'Fallon transmitted letters to Skywalker/Fort Wayne's regional dealers informing them that it had terminated its business relationship with Skywalker/ Fort Wayne. (*Id.* at ¶26; Exh. O).

Immediately thereafter, on September 14, 1999, Skywalker/Fort Wayne filed its "Verified Complaint for Damages and Preliminary Injunction in this court asserting claims for actual, compensatory, and punitive damages for (1) breach of fiduciary duty to a co-venturer; (2) tortious interference with contractual relations; (3) breach of contract; (4) constructive fraud; (5) violations of Indiana's conversion and criminal mischief statutes, and (6) recovery under a promissory estoppel theory. Skywalker/Fort Wayne also seeks injunctive relief "enjoining Skywalker/O'Fallon from communicating with EchoStar for the purpose of cutting off Skywalker/Fort Wayne from receiving further shipments of EchoStar products and enjoining Skywalker/O'Fallon from disparaging and ruining the business relationships of Skywalker/Fort Wayne with EchoStar. Finally, Skywalker/ Fort Wayne requests injunctive relief mandating Skywalker/

O'Fallon to continue operating under the Agreement and requiring Skywalker/O'Fallon to inform Skywalker/Fort Wayne's dealers and EchoStar that "business as usual under the Joint Venture Agreement will continue . . . as it has in the past."

Applicable Standard

When a federal court reviews the sufficiency of a complaint . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In determining the propriety of dismissal under Fed.R.Civ.P. 12(b)(6), the court "must accept as true all well-pled factual allegations in the complaint and draw all reasonable inferences therefrom in favor of the plaintiff." *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991). *See also Gomez v. Illinois State Bd. of Education*, 811 F.2d 1030, 1032-33 (7th Cir. 1987). Documents attached to the complaint can be considered by the district court, particularly where the documents are referenced throughout the complaint. *See Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir.1995). The court must "construe pleadings liberally, and mere vagueness or lack of detail does not constitute sufficient grounds for a motion to dismiss." *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985). "A complaint . . . should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Appendix E

Discussion

The statute of frauds requires "any agreement that is not to be performed within one (1) year from the making thereof' to be in writing, or at least evidenced by a memorandum signed by the party to be charged therewith to be enforceable. *Ind. Code* § 32-2-1-1. "[W]here the manifest intent and understanding of the parties are that the contract shall not be executed within the year, the mere tact that it is possible that the thing agreed to be done may be done within the year, will not prevent the statute from applying." *Wilson v. Ray*, 13 Ind. 1, 4 (1859) (quoting Browne on Statute of Frauds (5th Ed.) § 283).

The purpose of the statute of frauds is to preclude fraudulent claims that would "probably arise when one person's word is pitted against another so as to open wide those ubiquitous floodgates of litigation." *Ohio Valley Plastics, Inc. v. National City Bank*, 687 N.E.2d 260, 263 (Ind. App. 1997). "The party urging the validity of a contract bears the onus of proving its existence." *Ochoa v. Ford*, 641 N.E.2d 1042, 1044 (Ind. App. 1994). Skywalker O'Fallon argues that the alleged joint venture agreement shows, by its terms, that the parties did not intend it should be performed within one year, and therefore is required by the statute to be in writing. *See Wallem v. CLS Industries, Inc.*, 725 N.E.2d 880 (Ind. App. 2000) (oral settlement agreement was unenforceable under statute of frauds because weekly bonus payments intended to extend beyond one year); *Maglaris v. Claude Neon Federal Co. Inc.*, 198 N.E.2d 462 (Ind. App. 1935) (oral agreement to renew 36-month contract to install, repair, and maintain electric sign unenforceable under statute of frauds).

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Skywalker/O'Fallon maintains that the terms of the alleged oral joint venture agreement affirm that the time for performance was fixed at greater than one year. In considering the term of the agreement the court must determine from the contract itself whether "in the nature of things, without a violation of its provisions," and "according to a reasonable interpretation of its term," the contract could not be performed within a year. *Meyer v. Spink Co.*, 127 N.E.2d 455, 457 (Ind. App. 1920) (citations omitted). Skywalker/O'Fallon points out that Skywalker/Fort Wayne alleges that the purpose of the oral joint venture agreement was to obtain and fulfill distribution contracts with EchoStar. The distribution contracts with EchoStar had a term of five years. Skywalker O'Fallon further contends that the alleged oral joint venture agreement is not excluded from the statute of frauds by any of the three situations described in case law as determinative of whether a contract may or may not be performed within one year: "[w]here no time is fixed for the performance of a contract; or where it is to be performed by a certain day (the right to perform it sooner not being precluded); or where the performance depends upon a contingency which may or may not happen within a year, the contract is not within § 1 of the statute of frauds." *Wilson*, 13 Ind. at 4; *Purity Maid Products Co. v. American Bank & Trust Co.*, 14 N.E.2d 755, 758 (Ind. App. 1938); *Wright Manufacturing Corp. v. Scott*, 369 N.E.2d 2, 9 (Ind. App. 1977). "On the one hand, where, by the terms of the contract, it is not to be performed within the year; or where it cannot be performed within the year according to the intent and understanding of the parties as evidenced by the contract, it is within the statute. . . . [the statute] means to include any agreement which, fairly and reasonably interpreted, does not

admit of a valid execution within the space of a year from the making." *Wilson*, 13 Ind. at 4.

In the case at bar, it is clear that the alleged oral joint venture agreement was intended to last as long as the EchoStar contracts, which had a term of five years. According to Skywalker/Fort Wayne, the parties intended to act as distributors for the EchoStar products for the full five years. In fact, the basis of Skywalker/Fort Wayne's claim is that it was prevented from performing fully because Skywalker/ O'Fallon interfered with its ability to distribute EchoStar products while the contracts were still in effect. Therefore, it is also clear that full performance of the contracts, and thus of the alleged underlying oral joint venture agreement, was fairly and reasonably intended to span five years.

Indiana courts have provided a fixed term for agreements where one can be implied from the subject of the agreement itself. For example, in *Hurd v. Ball*, 143 N.E.2d 458 (Ind. App. 1957), the court found an agreement to "support and maintain" a child throughout his "infant life" was within the statute because "[a]n infant in its legal signification embraces any person who has not attained or arrived at the age of majority, which, in this state, is fixed at the age of twenty-one years." *Id.* at 463. In *Groves v. Cook*, 88 Ind. 169 (1882), the Indiana Supreme Court found an agreement to furnish the use of a stallion to a breeding mare, and to pay for the colt upon its delivery when it was five months old, was within the statute because "according to its terms, and in the course of nature, it could not be performed within one year from the time it was made" (the gestation period of a

horse being 11 months). *Id.* Here the alleged agreement is to fulfill five-year contracts; thus the fixed term of the agreement itself is five years.

Clearly, the EchoStar contracts were not capable of being performed within one year of their making, despite events that could have caused termination of the contracts. A breach of the contract that causes termination is not a contingency constituting performance. In *Wilson*, the Supreme Court of Indiana considered an alleged oral agreement and found it violated the statute of frauds. There, the parties agreed to hold bonds issued by the railroad company for sixteen months. In determining whether the agreement could be performed before one year, the Court considered both "contingency" and "termination".

The defendant in *Wilson* suggested the Supreme Court look to Webster's dictionary to define contingency: "a fortuitous event — that which comes without our design, or foresight, or expectation." *Id.* at 32. A contingency constituting performance is one that completes the performance of an agreement with no specific term, such as an agreement to pay for medical treatment once one is cured. *Freas v. Custer*, 166 N.E. 434 (Ind. 1929). In *Wilson*, holding the bonds for sixteen months was the contingency constituting performance. In the case at bar, the ability to distribute EchoStar products for five Years is the contingency constituting performance. The Skywalker Entities' alleged intent to fulfill the contracts presumes intent to perform completely. Fulfillment of the EchoStar contracts (complete performance) was intended to take place over five years. The EchoStar contracts could be terminated for failure to meet

subscriber activation quota for two consecutive quarters or if EchoStar discontinued manufacture and/or distribution of its products. However, Skywalker/Fort Wayne alleges that the intent of the parties was to obtain and fulfill the EchoStar contracts, which had a fixed time for performance — five years.

This court agrees with Skywalker/O'Fallon that in *Wilson* the Supreme Court of Indiana established the legal principle that termination of a contract is not a contingency constituting performance of an agreement for a term of years under the statute of frauds. Skywalker/Fort Wayne argues that *Wilson* is distinguishable from the present case because in *Wilson* the parties stipulated to their intent that their contract not be performed within one year. However, as Skywalker/O'Fallon points out, the parties in the present case did not expressly stipulate that their agreement could not be performed within one year because Skywalker/O'Fallon disputes the existence of *any* joint venture agreement. The facts in the present case show that, to the extent the parties entered into the alleged joint venture, they intended that the joint venture would continue until December 31, 2000. The term of the EchoStar contracts was fixed and intended to expire on December 31, 2000, almost five years from the date the contracts were signed. Clearly, the mutual promise to comply with the terms of the contracts until December 31, 2000 is an acknowledgment between the parties that their agreement is not to be performed within the year. As noted earlier, Indiana courts have provided a fixed term for agreements where one can be implied from the subject of the agreement itself. *See Hurd v. Ball*, 143 N.E.2d 458 (Ind. App. 1957). The possibility that EchoStar could terminate the contracts

at any time does not cancel the five-year term or the agreement. The alleged oral joint venture agreement was intended to be performed over five years, and could not have been performed within one year.

Skywalker/Fort Wayne argues that the December 31, 2000 expiration date of the EchoStar contracts can be disregarded, and that the court should analogize the parties' agreement to a lifetime employment contract, to which the statute of frauds does not apply. An employee who promises to work an entire lifetime for one employer would complete performance of the promise upon death. That analogy does not apply to the present case, however, because life (unlike the EchoStar contracts) has no fixed term. In the alleged joint venture agreement, the intended completion of performance culminates with five years of earning commissions paid for fulfilling the contracts through December 31, 2000, rather than culminating whenever the contracts happened to be terminated.

Skywalker/Fort Wayne also argues that the EchoStar contracts were terminable at will, claiming that the EchoStar contracts could be terminated "with or without cause" at any time. A review of the contracts, however, show that although the contracts recite many events that may cause termination, nowhere do the contracts state they are terminable at will or "without cause". Thus, the holding in *Wright Mfg. Corp. v. Scott*, 360 N.E.2d 2 (Ind. App. 1977), that the statute of frauds does not apply to a terminable at will contract, is inapplicable. Accordingly, this court finds that the alleged joint venture agreement violates the statute of frauds and is unenforceable.

Nevertheless, the court will briefly discuss Skywalker/ Fort Wayne's argument that the joint venture agreement is

excluded from the statute of frauds tinder the doctrine of part performance. Partial performance of an oral contract related to the sale of land or payment of the debt of another may remove that contract from the operation of the statute of frauds. *See DuPont Feed Mill Corp. v. Standard Supply Corp.*, 395 N.E.2d 808, 811 (Ind. App. 1979) (oral contract for sale of land may be removed from operation of statute of frauds by the doctrine of part performance). However, the parties agree that part performance of contracts not related to the sale of land or payment of the debt of another that could not be performed within one year of their making does not remove those contracts from the statute of frauds. *See Wolke v. Fleming*, 2 N.E. 325, 327 (Ind. 1885); *Montgomery Ward & Co. v. Guignet*, 45 N.E.2d 337, 342 (Ind. App. 1942); *Butler Univ. v. Weaver*, 180 N.E.2d 875, 877 (Ind. App. 1932). As it is clear that the parties could not perform a five-year contract within one year, the doctrine of part performance does not apply to the facts of this case.

Conclusion

On the basis of the foregoing, Skywalker/O'Fallon's motion to reconsider is hereby GRANTED. Accordingly, upon reconsideration, Skywalker/O'Fallon's motion to dismiss is hereby GRANTED. Skywalker/O'Fallon's Motion to Conditionally Strike Jury Demand is hereby DEEMED MOOT.

Enter: November 13, 2001.

s/ William C. Lee
William C. Lee, Chief Judge
United States District Court

APPENDIX F — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION DATED AND FILED OCTOBER 12, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Case No. 1:99 CV 0385

SKYWALKER COMMUNICATIONS OF INDIANA, INC.,

Plaintiff,

v.

SKYWALKER COMMUNICATIONS, INC.,

Defendant.

MEMORANDUM OF DECISION AND ORDER

This matter is before the court for resolution of Defendant, Skywalker Communications, Inc.'s ("Skywalker/O'Fallon" or "defendant") Motion to Dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) filed on September 28, 1999. Plaintiff, Skywalker Communications of Indiana, Inc. ("Skywalker/Fort Wayne" or "plaintiff') filed its response on October 5, 1999 to which Skywalker/O'Fallon replied on October 12, 1999.

For the reasons that follow, Skywalker/O'Fallon's motion will be DENIED.

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RELEVANT FACTS

The relevant factual allegations, excerpted from plaintiff's complaint and, for purposes of this motion, accepted as true are as follows:

Skywalker/Fort Wayne, f/k/a Apollo Satellite Systems ("Apollo"), is an Indiana corporation. (Complaint, ¶2). Skywalker/O'Fallon is a Missouri corporation. (*Id.* at ¶3). The parties' business relationship commenced in November 1992, pursuant to an agreement between the former Apollo and Skywalker/O'Fallon whereby Skywalker/O'Fallon granted Apollo permission to conduct business under the Skywalker name. (*Id.* at ¶24). From that point onward, Apollo became known as Skywalker Communications of Indiana, Inc., or herein, Skywalker/Fort Wayne.

Separate and apart from this 1992 agreement, (*Id.*), in early 1996 Skywalker/Fort Wayne and Skywalker O'Fallon (collectively herein "the Skywalker Entities") entered into an oral joint venture agreement ("the Agreement") for the purpose of selling and promoting the products and services of EchoStar Satellite Corporation ("EchoStar") with respect to DISH Network programming in the states of Missouri, Kansas, Illinois, Kentucky, Indiana, Michigan and Ohio ("the Territory"). (*Id.* at ¶¶1, 6). As part of the Agreement, the Skywalker Entities agreed to hold themselves out to EchoStar as one operating entity for the purpose of obtaining a contract for the sale of EchoStar products and services in the Territory. (*Id.* at ¶7). By holding themselves out to EchoStar as a single operating entity, the Skywalker Entities were able, through the merger of their respective dealer base

throughout the Territory, to meet the Subscriber Activation Quota ("SAQ") under the contract which requires distributors to meet quarterly and annual sales quotas. (*See* Plaintiff's Response, p. 7; Complaint, Exh. A, §2.1).

Thereafter, on February 22, 1996, Skywalker/O'Fallon, on behalf of both entities, entered into two agreements relating to EchoStar products. The first agreement, a Distributor Agreement with Houston Tracker Systems, Inc. ("HTS"), enabled the Skywalker Entities to market, distribute and sell satellite receivers and related components utilized in the reception of programming from satellite transponders owned by HTS of EchoStar DISH DBS receivers. The second agreement, a Distribution Commission Agreement with EchoStar, authorized the Skywalker Entities to be commissioned representatives of EchoStar (collectively, the "EchoStar Contracts").

Although the Skywalker Entities considered themselves a single entity to secure the underlying contracts for their business operations, they agreed to split the Territory which comprised the EchoStar Contracts into two smaller regional territories serviced independently by each entity. Under this arrangement, Skywalker/Fort Wayne is to distribute EchoStar products and services to its dealers in Indiana, Michigan, and Ohio while Skywalker/O'Fallon operated under the EchoStar Contract through its dealers in Missouri, Kansas, Illinois and Kentucky. (*Id.* at ¶¶1, 8). With the EchoStar Contracts secured, Skywalker/Fort Wayne proceeded to build an extensive network of dealers throughout its portion of the Territory. (*Id.* at ¶14).

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Within their respective regions, each entity was at liberty to contract with its own dealers to sell EchoStar products but retained mutual control over the subject of the joint business enterprise. (*Id.* at ¶10). As part of the Agreement, the Skywalker Entities agreed to share commissions and profits from the sale of EchoStar's services and products resulting from the EchoStar Contract. (*Id.*). The Skywalker Entities also agreed upon a payment arrangement for their operations. For instance, when a customer purchased EchoStar product from a Skywalker/Fort Wayne dealer, the customer forwarded payments directly to EchoStar for programming. In turn, EchoStar forwarded the monthly residual commissions due to Skywalker/Fort Wayne to Skywalker/O'Fallon. Skywalker/O'Fallon then deducted its share of the commission and remitted the remaining amount to Skywalker/Fort Wayne which, in turn, paid its dealers all residuals due them. Skywalker/Fort Wayne then retained the remaining as its income. (*Id.* at ¶10).

The Skywalker Entities operated in this fashion until August 1998, at which time a disagreement arose with respect to the regional Territory divisions. As a result, the Skywalker Entities clarified their agreement in a writing wherein Skywalker/Fort Wayne agreed to refrain from selling DISH networks sales and accessories and c-band electronics in Missouri, Illinois, Kansas, and Kentucky and Skywalker/ O'Fallon agreed to refrain from selling products in Indiana, Ohio and Michigan. (*Id.* at ¶13). Thereafter, the parties continued to conduct business, share commissions and profits and have mutual control over the subject matter of the joint enterprise as they had in the past. (*Id.* at ¶14)

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In March 1999, the Skywalker entities experienced a strain in their business relationship when Skywalker/O'Fallon began engaging in unilateral decisionmaking concerning their enterprise without consulting Skywalker/Fort Wayne. (*Id.* at ¶15, Exh. E). On March 31, 1999 and again on April 22, 1999, Alex Shiriaev ("Shiriaev"), Skywalker/Fort Wayne's President, wrote Roger Criebaum ("Criebaum"), Skywalker/ O'Fallon's President and CEO, addressing these concerns. (*Id.* at Exh. E.; ¶16; Exh. F).

By August 1999, the parties' business relationship further deteriorated. By letter dated August 12, 1999, Skywalker/ O'Fallon informed Skywalker/Fort Wayne that it was terminating the November 17, 1992 agreement permitting Apollo to use the Skywalker Communications name and that as of November 17 ,1999 it must cease conducting business under the Skywalker name. (*Id.* at ¶24; Exh. K). Thereafter, Skywalker O'Fallon informed Skywalker/Fort Wayne's dealers in its regional Territory that it should engage in business directly with Skywalker/O'Fallon and that as of November 16, 1999, Skywalker/Fort Wayne was no longer an authorized distributor of EchoStar products. (*Complaint* at ¶23). Skywalker/O'Fallon also told Skywalker/Fort Wayne's dealers that it was assuming control over all commissions and profits from the sale of EchoStar products and services. (*Id.* at ¶17).

On September 6, 1999, Skywalker/O'Fallon requested dealer information from Skywalker/Fort Wayne, and indicated that if it did not receive this information it would notify EchoStar to stop sending its products to Skywalker/ Fort Wayne and/or to stop remitting payment to Skywalker/

Fort Wayne and its dealers. Two days later, on September 8, 1999, EchoStar notified Skywalker/Fort Wayne that it was discontinuing supplying products or services to it. (*Id.* at ¶¶20, 21).

On September 13, 1999, Skywalker O'Fallon informed Skywalker/Fort Wayne that it was immediately terminating Skywalker Communications Inc./Apollo Satellite, Inc. November 17, 1992 agreement, that Skywalker/Fort Wayne should immediately cease using the Skywalker name, and should refrain from communications with EchoStar. On the same date, Skywalker/O'Fallon transmitted letters to Skywalker/Fort Wayne's regional dealers informing them that it had terminated its business relationship with Skywalker/ Fort Wayne. (*Id.* at ¶26; Exh. O).

Immediately thereafter, on September 14, 1999, Skywalker/Fort Wayne filed its "Verified Complaint for Damages and Preliminary Injunction in this court asserting claims for actual, compensatory, and punitive damages for (1) breach of fiduciary duty to a co-venturer; (2) tortious interference with contractual relations; (3) breach of contract; (4) constructive fraud; (5) violations of Indiana's conversion and criminal mischief statutes, and (5) recovery under a promissory estoppel theory. Skywalker/Fort Wayne also seeks injunctive relief "enjoining Skywalker/O'Fallon from communicating with EchoStar for the purpose of cutting off Skywalker/Fort Wayne from receiving further shipments of EchoStar products and enjoining Skywalker/O'Fallon from disparaging and ruining the business relationships of Skywalker/Fort Wayne with EchoStar. Finally, Skywalker/ Fort Wayne requests injunctive relief mandating Skywalker/

O'Fallon to continue operating under the Agreement and requiring Skywalker/O'Fallon to inform Skywalker/Fort Wayne's dealers and EchoStar that "business as usual under the Joint Venture Agreement will continue . . . as it has in the past."

Mindful of these facts, the court proceeds first to set forth this court's standard of review and then to examine the substance of the motion to dismiss.

APPLICABLE STANDARD

Before turning to the legal standard for the present motion, the court must preliminarily address whether this court will consider the deposition testimony of Shiriaev and Criebaum submitted by plaintiff in opposition to the motion to dismiss. Pursuant to Fed.R.Civ.P. 12(b), a motion to dismiss may be converted into Rule 56 motion for summary judgment if matters outside the pleadings are presented to the court and not thereafter excluded by the court:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed.R.Civ.P. 12(b). Under the rule, if the district court considers the extrinsic evidence in its resolution of the motion

to dismiss, it must convert the motion to a motion for summary judgment. *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 684 (7th Cir.1994) (where materials extraneous to pleadings are under consideration, Rule 12(b) compels district court to treat motion to dismiss as one for summary judgment); *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir.1993) (Rule 12(b) is mandatory, so that if materials outside pleadings are before district court and not excluded, court must convert 12(b)(6) motion to one for summary judgment).

Having reviewed the merits of the motion to dismiss, this court concludes that it is not necessary to its resolution to consider the deposition testimony of the aforementioned individuals. As a result, this court's decision rests solely on the allegations contained in the complaint and its attachments (considered part of the complaint). Accordingly, the court proceeds under the 12(b)(6) standard to determine whether plaintiff's complaint is legally sufficient.

When a federal court reviews the sufficiency of a complaint . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In determining the propriety of dismissal under Fed.R.Civ.P. 12(b)(6), the court "must accept as true all well-pled factual allegations in the complaint and draw all reasonable inferences therefrom in favor of the plaintiff." *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991). *See also Gomez v. Illinois State Bd. of Education*, 811 F.2d 1030, 1032-33 (7th Cir. 1987). Documents attached to the complaint can

be considered by the district court, particularly where the documents are referenced throughout the complaint. *See Siefken v. Village ofArlington Heights*, 65 F.3d 664, 666 (7th Cir.1995). The court must "construe pleadings liberally, and mere vagueness or lack of detail does not constitute sufficient grounds for a motion to dismiss." *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985). "A complaint . . . should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

DISCUSSION

Skywalker/O'Fallon's motion to dismiss is two-fold. First, Skywalker/O'Fallon contends that Skywalker/Fort Wayne has plead facts which conclusively establish that the Skywalker Entities did not enter into a joint venture as it is defined under Indiana law. Alternatively, defendant advances that Indiana's statute of frauds, Ind. Code §32-2-1-1, forecloses this court from recognizing a valid joint venture agreement exists because there is no writing memorializing such an agreement, as is required by Indiana's statute.[1]

1. Skywalker/O'Fallon also raises an issue regarding the scope of its own motion to dismiss. Skywalker/O'Fallon argues that if this court finds that the facts as pleaded preclude a finding that a joint venture exists as a matter of law, the entire seven count complaint must fail as well since all seven counts are premised on the existence of such an agreement. In sharp contrast, Skywalker/Fort Wayne contends that even if defendant prevails on the motion to dismiss, the dismissal should only relate to Counts I (breach of fiduciary duty

(Cont'd)

The court shall proceed to examine each of these arguments in turn.[2]

(Cont'd)
owed a co-venturer) and III (breach of contract), both of which require plaintiff to prove the existence of joint venture. As for the remaining counts of the Complaint, Skywalker/Fort Wayne asserts that none of them require it to demonstrate a joint venture exists in order to recover. Thus, at a minimum, Skywalker/Fort Wayne argues, it is entitled to proceed on its claims of tortious interference with contract, constructive fraud, violations of Indiana's conversion and criminal mischief statutes, and its theory of promissory estoppel, regardless of this court's conclusion on the motion to dismiss. Fortunately, because this court concludes that plaintiff withstands the motion to dismiss, it need not delve into this issue of the scope of the motion to dismiss.

2. Defendant also argues that the November 17, 1992 agreement is controlling and demonstrates that no joint venture existed between the parties. In response, plaintiff points out that while its Complaint acknowledges the existence of the November 17, 1992 Agreement it also expressly pleads in ¶24 that a separate and distinct oral agreement existed relating to the joint venture arrangement. Thus, plaintiff argues that it is not relying on the existence of the 1992 Agreement to support its claim that a joint venture exists. In its reply, plaintiff claims this allegation is "conclusory" and that no allegation exists that the 1992 Agreement has been terminated. As for the conclusory allegation, as noted *infra*, plaintiff is entitled to plead conclusory facts so long as they provide minimal notice to the defendant. Given the allegations in the Complaint, this court agrees that plaintiff has set forth a claim, separate and apart, from the 1992 Agreement that a joint venture exists.

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A. *Existence of Allegations Supporting a Joint Venture*

Under Indiana law, a joint venture is "an association of two or more persons [formed] to carry out a single business enterprise for profit, for which purpose they combine their property and services." *Boyer v. First National Bank of Kokomo*, 476 N.E.2d 895, 897 (Ind.App. 1985). For a joint venture to exist, the parties must be bound by an express or implied contract providing for "(1) a community of interests, and (2) joint or mutual control, that is, an equal right to direct and govern the undertaking, that binds the parties to such an agreement." *Id.* at 898. Although *Boyer* sets forth each of these criteria as demonstrative of a joint venture arrangement, *Boyer* also holds that neither criterion is dispositive. *Id.*

As indicated *supra*, Skywalker/O'Fallon advances that plaintiff's complaint establishes neither of these elements.

1. *Common Enterprise and Mutual Control*

Skywalker/O'Fallon maintains that the well-pled allegations of Skywalker/Fort Wayne's Complaint admit that neither a common enterprise or mutual control over such an enterprise exists as a matter of law. Skywalker/O'Fallon reasons that since ¶¶1 and 8 of the Complaint specifically plead that the respective regional Territories are separate and distinct these facts clearly indicate the lack of a common enterprise over which mutual control could exist. Moreover, Skywalker/O'Fallon argues that by pleading a claim of tortious interference with plaintiff's dealers, plaintiff has again admitted that no common undertaking exists since it

is again claiming that its dealers were independent of the enterprise. Finally, Skywalker/O'Fallon contends that because it was the entity which entered into the two EchoStar Contracts, it is clear that Skywalker/Fort Wayne lacked control over the contracts.

In rebuttal, Skywalker/Fort Wayne contends that defendant's arguments demonstrate a fundamental misunderstanding of the parties' arrangement as set forth in the Complaint. According to Skywalker/Fort Wayne, the Complaint alleges that the parties engaged in a common enterprise to "obtain[] and fulfill[]" a contract with EchoStar to distribute EchoStar products. In furtherance of this common enterprise the two entities agreed to hold themselves out to EchoStar as a single operating entity so that they could secure an EchoStar distribution contract. As part of their agreement the entities also agreed to contribute sales from their respective dealer bases in their portion of the Territory to the EchoStar contract, (Complaint, ¶8), but retained control over their respective territories. According to plaintiff, it is the very fact that each retained control over their respective Territories when operating under the EchoStar Contracts which provides the facts upon which a court could find that the co-venturers exercised mutual control over the subject matter, i.e., the sale of satellite products and services, of the joint venture. Indeed, as plaintiff indicates, "both entities received the benefit of the EchoStar Contracts as long as the Contracts were not terminated." (*Response*, p. 7). Thus, Skywalker/Fort Wayne urges that these facts clearly demonstrate a set of facts upon which a court or a fact-finder for that matter could conclude that the alleged co-venturers engaged in a common enterprise and exercised mutual control over the subject of the enterprise.

The core of the parties' dispute on this issue and, by extension, the preliminary issue for resolution by this court, revolves around what Skywalker/Fort Wayne alleges to be the "common enterprise" of the joint venture. The Complaint alleges that the two entities joined forces "for the purpose of selling and promoting the products and services of EchoStar . . ." (Complaint, ¶1), and "for the purpose of obtaining a contract for the sale of EchoStar products and services in the Territory." (Complaint, ¶7). These allegations, as plaintiff argues, support its contention that the common enterprise involved both the acquiring of the EchoStar contract and then, the subsequent sales and promotions of EchoStar products under that contract.

Using these well-pleaded facts, the court concludes that Skywalker/Fort Wayne has properly alleged facts which, when accepted as true, show that the Skywalker Entities engaged in a common enterprise. The enterprise is "common" in that the Complaint alleges that both entities combined their respective dealer bases to acquire and perform the EchoStar Contracts and agreed to hold themselves out jointly to secure the EchoStar Contracts. *See* Complaint, ¶¶1, 6, 7, 8, Exh. B (HTS Contract, Exh. A listing territories for sales). As noted previously, this court must decide only whether any set of facts consistent with the allegations of the complaint and the reasonable inferences therefrom could support plaintiff's requested relief. From the Complaint's allegations this standard is clearly met.

As set forth in the Complaint, the Skywalker Entities collaborated by contributing their respective dealer bases to the common enterprise of obtaining the EchoStar contracts

and fulfilling the SAQ requirements contained therein. In its reply, Skywalker/O'Fallon takes issue with this factual assertion claiming that "this allegation is not contained in the Complaint, and accordingly, should not be considered by this Court." (Reply, p. 3). It is true that the allegation that the combined dealer base was used to meet the SAQ is not plead expressly in the Complaint. However, such an allegation is presented in plaintiff's brief and appears consistent with the other factual allegations in the Complaint. Moreover, in this circuit, "complaints are construed favorably to their drafters," *Yeksigian v. Nappi*, 900 F.2d 101, 102 (7th Cir.1990), and, more importantly, the Seventh Circuit has clearly articulated that "[a] plaintiff need not put all of the essential facts in the complaint. He may add them by affidavit or brief" in order to defeat a motion to dismiss if these facts are consistent with the allegations in the complaint. *Hentosh v. Herman Finch Univ.*, 167 F.3d 1170,1173 fn. 3 (7th Cir. 1999); *Hrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963-64 (7th Cir.1992); *see also Stevens v. Umsted*, 131 F.3d 697, 705 (7th Cir.1997). Thus, this court is at liberty to consider this statement contained in plaintiff's response brief.

Considering these allegations, a reasonable inference is that the EchoStar contracts, i.e., the very purpose for joining forces, could not remain in existence without the contribution of each regional Territory's dealer base. Accepted as true, these facts are sufficient to indicate that the parties engaged in a common enterprise. Further, the fact that Skywalker/ Fort Wayne also alleges that the entities agreed to divide the Territory after acquiring the EchoStar Contracts does not undermine the existence of the common enterprise, as it is described herein and alleged in the Complaint.

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Similarly, throughout the Complaint, Skywalker/Fort Wayne alleges that the parties undertook "mutual control" over the subject matter of the joint enterprise. (Complaint, ¶¶1, 14). "Mutual control need not extend to every aspect of the venture," *Walton v. Fujita Tourist Enterprises Co. Ltd.*, 380 N.W.2d 198, 201, nor does mutual control necessarily import "equal" control or direction of the undertaking. *See Eden United, Inc. v. Short*, 573 N.E.2d 920 (Ind. App. 1991). Indeed, in *Eden* the defendants asserted that mutual control requirement necessitated that the parties to a venture each have the ability to exercise equal control over the undertaking. The court rejected the theory that mutual control implies equal control stating,

> [O]ur common law as a whole, while requiring that a party have the ability to exercise mutual control over the subject matter of the enterprise or property engaged therein, has never imposed an all-inclusive definition or fixed an[y] (sic) certain boundaries on the legal concept, nor has it weighed in a comparative fashion the extent of control exercised by the parties to a venture . . . We also decline to impose such a mechanistic approach, particularly here where the evidence establishes that the various corporations contributed resources and labor toward the success of the enterprise . . .

Eden, 573 N.E.2d at 931. Thus, at a minimum, plaintiff must allege that each entity had at least some control over the manner of performance under the EchoStar Contracts.

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Skywalker/O'Fallon objects to plaintiff's characterization that both Skywalker Entities had a mutual right of control over the EchoStar Contracts claiming that the Complaint "utterly fail[s] to show . . . an equal right to direct and govern the undertaking, i.e. the distribution of EchoStar product in the Territory." (Motion, p. 5). In support of this assertion, Skywalker/O'Fallon directs this court to two Seventh Circuit opinions, *Secon Service System v. St. Joseph Bank & Trust*, 855 F.2d 406 (7th Cir. 1988) and *Wilson v. American TransAir, Inc.*, 874 F.2d 386 (7th Cir. 1989), which, it contends, supports a conclusion that plaintiff cannot demonstrate the existence of a joint venture based on the Complaint's allegations. Although summarized herein, neither case is particularly helpful to resolving the issue at hand.

In *Secon Service*, the plaintiff, after a deal to sell operating authorities to Indiana Refrigerator Lines ("IRL") turned sour, attempted to hold IRL's bank responsible for the failure of the deal to crystallize under the theory that the bank and IRL were joint venturers in the deal. The plaintiff asserted that the bank, as a creditor of IRL, indirectly shared in its profits and, by virtue of an agreement with IRL's owner, had representation on IRL's Board of Directors, thereby giving it some control over the corporation's funds. On these facts, however, the Seventh Circuit concluded that no joint venture existed because the plaintiff made no showing of a mutual right between the bank and IRL to direct and govern the undertaking. *Secon*, 855 F.2d at 416-417.

In *Wilson*, the plaintiffs asserted that a joint venture existed between a charter tour operator and the owner of a

hotel which provided accommodations to tour passengers. In alleging a joint venture, plaintiffs attempted to recover damages for injuries sustained by one of them as a result of a criminal assault which occurred in the hotel. As part of their contentions, plaintiffs argued that the charter company and the hotel engaged in coordinated promotional activities for their mutual advantage. In addition, the charter was paid for its promotional services. Despite these facts, the Seventh Circuit again concluded that no joint venture existed because the record contained no evidence of any agreement to share profits and losses, and no evidence that the charter operator had an equal right to direct the operations of the hotel. *Wilson*, 874 F.2d at 392.

Having reviewed the above two cases cited by defendant, this court is not convinced that the instant case falls so clearly within the framework of either so as to grant its Motion to Dismiss. Unlike either *Secon* or *Wilson*[3], which were decided with the benefit of a developed summary judgment record, the instant case is in its infancy and is not before the court with a fully developed evidentiary record. With that in mind, the plaintiff in this case alleges that each entity to the purported joint venture had control over a critical and necessary part of that venture by virtue of their control over a regional Territory's sales of EchoStar products. (Complaint,

3. In *Wilson*, three months after the defendant filed for summary judgment, the plaintiffs attempted to amend their complaint to add the allegations concerning the existence of a joint venture. The Seventh Circuit affirmed the district court's denial of leave to amend stating that the allegations in the amended pleading would not have survived summary judgment. Even under these facts, however, both the district court and the Seventh Circuit had the benefit of an evidentiary record relating to the claims.

¶1). As plaintiff acknowledges, in their respective regional Territories each entity controlled the sales of EchoStar products with its dealers, which sales were crucial to the EchoStar contract. In addition, the Complaint alleges that the parties agreed on the manner of payment of residual commissions and other fees, which provides an inference that the entities equally participated in discussions regarding payment. Complaint, ¶10. Defendant has submitted no authorities which would clearly foreclose a finding of mutual control under these circumstances. Thus, presented with plaintiffs allegations, this court cannot conclude that under no set of facts could Skywalker/Fort Wayne prevail on its claim that the two entities exercised mutual control over the purported joint enterprise.

2. *Sharing of Profits / Risk of Loss*

In addition to its above arguments. Skywalker/O'Fallon contends that Skywalker/Fort Wayne neither asserts substantial risk on its part in the joint venture arrangement nor does it allege any more than conclusory allegations with respect to the sharing of profits and losses. In particular, Skywalker/O'Fallon points to ¶1 of the Complaint which asserts that "Skywalker/Fort Wayne expended substantial amounts of capital and time in advertising and building a network of dealers throughout its portion of the Territory." Nowhere in the Complaint, contends defendant, does plaintiff allege that Skywalker/O'Fallon contributed substantial amounts of capital or time to the joint venture. (Motion, p. 5; Reply, p. 3). Thus, defendant argues, plaintiff fails to assert that Skywalker/O'Fallon had a stake or risk associated with the joint venture.

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In Indiana, a joint venture agreement must provide for the sharing of profits, although "it need not distribute them equally." *Boyer*, 476 N.E.2d at 898; *Lafayette Bank and Trust Co. v. Price*, 440 N.E.2d 759, 762 (Ind.App.1982). In contrast, however, Indiana does not require the sharing of losses as an element of a joint venture agreement. *See Lafayette Bank*, 440 N.E.2d at 762 (sharing of losses, if the losses involve only time and labor, need not specifically be in the joint agreement). In fact, in Indiana, the distribution of monetary losses and expenses may be implied from the manner in which profits are to be shared. *Mantooth v. Federal Land Bank of Louisville*, 528 N.E.2d 1132, 1140 (Ind.App. 1988).

Here, plaintiff alleges throughout its Complaint that the parties agreed to share both commissions and profits from the enterprise. (Complaint, ¶10).[4] Further, in ¶11 of the Complaint, plaintiff alleges the manner in which the commissions/profits for sales traversed from entity to entity with each entity removing its share of the commission/profit. From these allegations it may be implied that the parties also

4. Skywalker/O'Fallon contends that these allegations are conclusory and thus, insufficient allegations. However, under the notice pleading rules in the Federal Rules of Civil Procedure, a plaintiff is required only to set forth a short, plain statement of the facts demonstrating an entitlement to relief. Fed.R.Civ.P. 8(a). Under these rules, plaintiffs "need not plead facts: [they] can plead conclusions. [However], the conclusions must provide the defendant with at least minimal notice of the claim." *Kyle v. Morton High School*, 144 F.3d 448, 455 (7th Cir. 1998). In light of the detailed and extensive allegations in this case, this court finds the mere allegation that the parties shared profits sufficient under the federal pleading rules.

agreed to share in losses. More importantly, the fact that it is alleged that the parties agreed to share in profits also impliedly assumes that the parties bear the risk of no profit and, in turn perhaps, no commission. Thus, the fact that plaintiff's complaint is silent with respect to the sharing of losses is not determinative of whether a joint venture exists in this case.

As for the contention that Skywalker/Fort Wayne fails to allege a substantial risk in the enterprise on Skywalker/O'Fallon's part, this court has been presented no authorities which require such an allegation for plaintiff to establish the existence of a joint venture under Indiana law. Nevertheless, a fair inference from the allegations in the Complaint is that a substantial risk assumed by both parties is the risk of not fulfilling the terms of the EchoStar Contracts and thus, losing the very subject of the enterprise itself. Thus, this court finds that plaintiff has adequately alleged both shared profits and risk on the part of Skywalker/O'Fallon.

In sum, this court finds that it is not beyond doubt that plaintiff could prove a set of facts consistent with its Complaint which would entitle it to relief based on the theory that a joint venture exists. Accordingly, Skywalker/O'Fallon's motion to dismiss is hereby DENIED.

B. *Statute of Frauds*

In the alternative, Skywalker/O'Fallon asserts that this court should dismiss the Complaint because the alleged joint venture agreement does not comply with the Statute of Frauds. Indiana's Statute of Frauds provides that "any

agreement that is not to be performed within one (1) year from the making thereof . . . shall be in writing, and signed by the party to be charged therewith. . . ." Ind.Code §32-2-1-1. An agreement falling within this provision but not memorialized by a signed writing is unenforceable. *Id.*

Skywalker/O'Fallon's argument runs that any alleged joint venture agreement could not, by its very terms, be fully performed within one year of its making and thus, it is required to be in writing. Skywalker/O'Fallon bases this argument on the terms of the underlying EchoStar Contracts entered into in February 1996. It argues that because the EchoStar Contracts specify a fixed end date of December 31, 2000, at which time the contracts terminate, it is clear that the Agreement based on the EchoStar Contracts could not be performed within one year.

Skywalker/Fort Wayne parries these arguments with its contention that the EchoStar Contracts were subject to numerous contingencies, all of which could have resulted in the cancellation of those contracts within a year of their making, thereby completing the co-venturer's obligation to perform under the terms of the joint venture. Under this theory, Skywalker/Fort Wayne urges that since the Agreement was effective only so long as the EchoStar Contracts remained in effect, there was a possibility that the Agreement could have terminated within a year of its making. Thus, since their Agreement was capable of termination within a year, it likewise would have been fully performed within a year and it need not satisfy Indiana's statute of frauds.

Notably, the fact that a contract may not be performed within one year is insufficient alone to make it subject to the requirements of the Statute of Frauds. *Silkey v. Investors Diversified Services, Inc.*, 690 N.E.2d 329, 334 (Ind.App. 1998). Rather,

> it must affirmatively appear by the terms of the contract, that its stipulations are not to be performed within a year after it is made, in order to bring it within the provisions of the statute of frauds. The Statute of Frauds has always been held to apply only to contracts which, by the express stipulations of the parties, were not to be performed within a year, and not to those which might or might not, upon a contingency, be performed within a year. The one year clause of the Statute of Frauds has no application to contracts which are capable of being performed within one year of the making thereof.

Id; *Wior v. Anchor Industries, Inc.*, 641 N.E.2d 1275, 1278 (Ind.Ct.App.1994), rev'd on other grounds, 669 N.E.2d 172 (Ind. 1996), reh'g denied, (emphasis added) (internal citations omitted). As one learned author notes,

> To fall within the words of the provision . . . the agreement must be one of which it can truly be said at the very moment that it is made, 'This agreement is not to be performed within one year'; in general, the cases indicate that there must not be the slightest possibility that it can be fully performed within one year.

4 CAROLINE N. BROWN, CORBIN ON CONTRACTS, §19.1 (Rev. ed. 1997).

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In this case, although defendant accurately recites that the termination date in the EchoStar Contracts seemingly places its underlying Agreement with Skywalker/Fort Wayne within the statute of frauds, it nonetheless overlooks provisions in those contracts which would clearly remove the Agreement from the statute of frauds. In both the EchoStar Contracts, contingencies exist through which EchoStar could terminate the contracts within the one year period of its making.[5] In its reply brief, Skywalker/O'Fallon argues that the fact that the EchoStar Contracts could terminate within one year is irrelevant since the question before the court is whether the parties' Agreement could be fully performed within one year. (*Reply* p. 6).[6] This court disagrees.

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5. The court notes that whether the EchoStar Contracts were, in fact, terminated within one year of their making is irrelevant to the analysis the court must undertake. *See* 4 CAROLINE N. BROWN, CORBIN ON CONTRACTS, §19.1 (Rev. ed. 1997) (indicating courts construe the language of the statute very narrowly since "The statute does not say 'agreement that is not in fact performed' or 'agreement that may not be performed.'")

6. In support of this proposition, defendant cites *Ryan v. Upchurch*, 474 F.Supp. 211 (S.D.Ind. 1979). This case, however, was a case involving an employment contract for life and is inapposite to the present facts. Moreover, the district court in that case concluded in a fashion which, it appears, would support a finding that the statute of frauds does not apply in the instant case:

> There is no statute of frauds problem in this case. To fall within the statute, the agreement must be one of which it can truly be said at the very moment that it is made that there can be not the slightest possibility that it can be fully performed within one year. See 2 Corbin on Contracts s 444, at 535 (1950). In this factual situation, J.

(Cont'd)

Appendix F

The termination rights, as spelled out in the EchoStar Contracts, are one of two kinds. Under certain provisions, the EchoStar Contracts terminate automatically upon the occurrence of the contingency. Under others, the contracts terminate at the option of HTS or EchoStar. In the Complaint, plaintiff alleges that the Agreement is tied to the existence of the EchoStar Contracts. Thus, *so long as* the EchoStar Contracts remain viable, the Agreement exists and the parties are required to perform under that Agreement, i.e., by combining sales to meet the quota, sharing profits, continuing sales in their respective Territories. As such, plaintiff's complaint alleges performance which is to continue for an uncertain time, or phrased differently, performance which shall come to an end only upon the happening of some condition. In this case, the condition is the termination of the EchoStar Contracts. To the extent that the EchoStar Contracts terminated in either of the ways permitted above within a year of the Agreement's making, the Agreement would likewise be fully performed. *See* 4 CAROLINE N. BROWN, CORBIN ON CONTRACTS, §19.3 (discussing performance which is to continue for an uncertain time and stating "if the condition is one that may happen within one year, the promise is not within the statutory one-year clause."). Thus, due to the contingencies in the EchoStar Contracts, there existed, at the time the entities

(Cont'd)

> C. Penney Company, Inc., if it had found just cause to discharge plaintiff, could have done so within the first year of the contract. Accordingly, since there was the possibility at the time the contract was entered that it could be fully performed within one year, the statute of frauds is not a bar to the enforcement of this oral contract.

474 F.Supp. 211, 214. Further, in *Ryan v. J. C. Penney Co., Inc.*, 627 F.2d 836 (7th Cir. 1980), the Seventh Circuit reversed the district court's decision on grounds unrelated to the statute of frauds issue.

allegedly entered into their Agreement, a "slight possibility" that their Agreement could be fully performed within a year. As such, the Agreement is outside of the statute of frauds and need not be in writing to be enforceable.[7] Accordingly, defendant's motion to dismiss based on the lack of a written joint venture agreement is hereby DENIED.

CONCLUSION

As a final note, the court is mindful that whether a joint venture exists is generally a question of fact and thus, whether the plaintiff has, upon further development of the record, established the existence of a joint venture or, at the very least, established a question of fact on that point, remains open. Accordingly, this court in ruling as it does presently has not foreclosed the possibility of revisiting this issue in a properly supported summary judgment motion or otherwise.

Based on the foregoing, Skywalker/O'Fallon's Motion to Dismiss plaintiff's "Verified Complaint for Damages and Preliminary Injunction is hereby DENIED.

Entered: October 12, 1999

s/ William C. Lee
William C. Lee, Chief Judge
United States District Court

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7. Because this court concludes that the Agreement is not within the Statute of Frauds, it need not consider plaintiff's alternative argument that partial performance would remove the Agreement from the writing requirement.

APPENDIX G — STATUTES INVOLVED

ARTICLE 2

REQUIREMENT OF A WRITING

* * *

CHAPTER 1

STATUTE OF FRAUDS

* * *

32-2-1-1 Agreements or promises covered

Sec. 1. No action shall be brought in any of the following cases:

* * *

Fifth. Upon any agreement that is not to be performed within one (1) year from the making thereof; or

* * *

Unless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, excepting however, leases not exceeding the term of three (3) years.

* * * *

Appendix G

CHAPTER 3

TREBLE DAMAGES ALLOWED IN CERTAIN CIVIL ACTIONS BY CRIME VICTIMS

* * *

34-24-3-1 Offenses against property; recovery of damages, costs, and attorney's fees

Sec. 1. If a person suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3. IC 33-42-3-4, or IC 35-45-9, the person may bring a civil action against the person who caused the loss for the following:

(1) An amount not to exceed three (3) times the actual damages of the person suffering the loss.

(2) The costs of the action.

(3) A reasonable attorney's fee.

(4) Actual travel expenses that are not otherwise reimbursed under subdivisions (1) through (3) and are incurred by the person suffering loss to:

(A) have the person suffering loss or an employee or agent of that person file papers and attend court proceedings related to the recovery of a judgment under this chapter; or

(B) provide witnesses to testify in court proceedings related to the recovery of a judgment under this chapter.

(5) A reasonable amount to compensate the person suffering loss for time used to:

(A) file papers and attend court proceedings related to the recovery of a judgment under this chapter; or

(B) travel to and from activities described in clause (A).

(6) Actual direct and indirect expenses incurred by the person suffering logs to compensate employees and agents for time used to:

(A) file papers and attend court proceedings related to the recovery of a judgment under this chapter: or

(B) travel to and from activities described in clause (A).

(7) All other reasonable costs of collection.

Appendix G

35-43-1-2 Criminal mischief; operator's permit or license (first version)

* * *

Sec. 2. (a) A person who:

(1) recklessly, knowingly, or intentionally damages or defaces property of another person without the other person's consent; or

(2) knowingly or intentionally causes another to suffer pecuniary loss by deception or by an expression of intention to injure another person or to damage the property or to impair the rights of another person;

commits criminal mischief, a Class B misdemeanor. . . .

* * * *

35-43-4-3 Conversion

Sec. 3. A person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a Class A misdemeanor.

* * * *